East Coast Economic Region Development v Multi-Spex Architects Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C(ARB)-21–07 OF 2020 AND WA-24C(ARB)-27–08 OF 2020

ALIZA SULAIMAN J

11 FEBRUARY 2022

Arbitration — Award — Enforcement — Application for — Arbitrator awarded in favour of claimant — Whether enforcement application of award ought to be allowed

Arbitration — Award — Setting aside — Application for — Arbitrator awarded in favour of claimant — Whether arbitrator decided on matters beyond the scope of submission to arbitration — Whether arbitrator breached rules of natural justice and Arbitration Act 2005

Civil Procedure — Adducing fresh evidence — Application for leave to adduce fresh evidence for purposes of hearing setting aside application of award — Whether application to adduce fresh evidence ought to be allowed

Civil Procedure — Pleadings — Amendment — Application for leave to amend setting aside application of award — Whether amendment application ought to be allowed

The defendant, Multi-Spex Architects Sdn Bhd ('Multi-Spex') was a company incorporated in Malaysia. The plaintiff, East Coast Economic Region Development Council ('ECERDC') was a statutory body established under the East Coast Economic Region Development Council Act 2008 with the objective of, inter alia, providing for proper direction, policies and strategies in relation to the development within the East Coast Economic Region comprising the States of Kelantan, Terengganu, Pahang and the District of Mersing in the State of Johor. By a construction contract, ECERDC had appointed Pembinaan SPK Sdn Bhd ('PSPK') as the main contractor for a project and the aim was to eradicate poverty by constructing building for animal production units ('APU') for sheep-rearing, support facilities, housing and community facilities for the resettlement of villagers. Earlier, by way of a letter of appointment ('LOA'), ECERDC had appointed Multi-Spex as the principal consultant for the master planning and detailed design for the project. The terms and conditions of the appointment were set out in Annexure

1 to the LOA ('consultancy agreement'). ECERDC had also appointed KLCC Projeks Sdn Bhd ('KLCCP') as the project manager. The project was divided into phases and the dispute which eventually arose between the parties was in respect of Phase 1. There were two zones for Phase 1 namely, Zone A and Zone B. In July 2012, the structural works for all APU buildings were completed. However, in February 2013 and before the handover to ECERDC, structural and non-structural defects were discovered at the buildings in Zone B of the APU area. More defects were later detected in July 2013 to the buildings in Zone B. Multi-Spex alleged that most of the defects were attributable to construction that was not carried out in accordance with the drawings. Thereafter, ECERDC proposed for mutual termination of the consultancy agreement, but this was rejected by Multi-Spex. Hence, ECERDC issued the notice of termination of the consultancy agreement to Multi-Spex. ECERDC later issued a notice of arbitration to Multi-Spex. Sometime in 2015, defects were further detected at three of the APU in Zone A and the Central Store. The arbitrator was satisfied that ECERDC had successfully proved its claims. ECERDC applied to enforce the arbitration award ('the award') against Multi-Spex ('the enforcement application'). Multi-Spex filed to set aside the entire, or part of the award ('setting aside application') on the grounds that: (a) the arbitrator decided on matters beyond the scope of the submission to arbitration; (b) the arbitrator's findings showed that the defects arose from the performance of the construction of the piles which was not done in accordance with the design and drawings which was PSPK's scope of duty; and (c) the arbitrator failed to consider the scope of works of PSPK and KLCCP by preventing Multi-Spex's witness from referring to the construction contract. Multi-Spex also filed notices of application to be given leave to: (i) adduce fresh evidence for the purposes of the hearing of the setting aside application ('the fresh evidence application'); and (ii) amend the setting aside application ('the amendment application').

Held, allowing the enforcement application; and dismissing the fresh evidence application, amendment application and setting aside application:

(1) Multi-Spex had cited s 37(2)(a) of the Arbitration Act 2005 ('the AA 2005') and O 1A, O 3 r 5 and/or O 92 r 4 of the Rules of Court 2012 ('the ROC 2012') as the basis for the application in the fresh evidence application. However, the statutory provisions on which the setting aside application was founded were s 37(1)(a)(v); 37(1)(b)(ii); and 37(2)(b)(i) and (ii); and s 37(3) of the AA 2005 only. No express reference was made to s 37(2)(a) of the AA 2005. Hence, Multi-Spex could not, in the fresh evidence application, rely on s 37(2)(a) of the AA 2005 to set aside the award when this provision was never invoked in the setting aside application in the first place. As for the reliance on O 1A, O 3 r 5 and/ or O 92 r 4 of the ROC 2012, there was no justifiable reason for the court to exercise the discretion or the powers in favour of Multi-Spex. The fresh

A evidence application was nothing but an attempt to re-litigate the matter. There was no basis to allow the fresh evidence application under any of the provisions cited by Multi-Spex (see paras 27–28).

(2) The amendment application was a tactical move by Multi-Spex to push B the fresh evidence through for purposes of the setting aside application following the failure to do so vide the fresh evidence application. MultiSpex's averments in its affidavits were essentially similar to the affirmations made in support of the fresh evidence application and the same could be said of the proposed amendments when compared with C the evidence which Multi-Spex had sought to adduce vide the fresh evidence application. ECERDC would be unfairly prejudiced if the amendment application was allowed since the parties had exchanged all their respective affidavits and submissions in respect of the setting aside application and the enforcement application and the hearing of both D these applications would have to be adjourned as parties would have to exchange affidavits and prepare supplemental written submissions to address the facts in the proposed amendments which was raised belatedly (see para 39).

E (3) ECERDC's complaints pertained to Multi-Spex's obligations which were supposed to carry out at the project site. The defects which were pleaded occurred in Phase 1 of the project which consisted of Zone A and Zone B. Having considered ECERDC's pleadings in the arbitration proceedings, there was no doubt at all that reference had been made to the defects in F both Zone A and Zone B and that ECERDC's stand was that Multi-Spex was accountable for these defects. Therefore, Multi-Spex's first ground of challenge was completely baseless (see paras 60–61).

(4) Multi-Spex contended that the arbitrator had found that the defects arose from the performance of the construction of the piles which was not done G in accordance with the design and drawings ie which was PSPK's scope of duty and not Multi-Spex's. However, Multi-Spex did not go on to establish which rule of natural justice was breached, how it was breached, in what way the breach was connected to the making of the award and how the breach prejudiced its rights. The Tribunal had considered H Multi-Spex's contentions that the defective works were caused by PSPK's construction. The argument that the arbitrator had breached the rules of natural justice and s 20 of the AA 2005 by not allowing Multi-Spex to refer to the construction agreement had been considered and decided by the court as being completely baseless as Multi-Spex had singled out that I particular session of the arbitration hearing. This specific instance certainly did not amount to Multi-Spex being prevented from referring to the construction contract. Multi-Spex was given other opportunities to put its case as to the construction contract during the arbitration hearing. Multi-Spex was given ample opportunity to present its case

including to submit, among others, that KLCCP was responsible for the duty of supervision of the works and not Multi-Spex. In the premises, there was no merit whatsoever to these two grounds of challenge. Therefore, Multi-Spex had not established the legal requirements in its attempt to set aside the award (see paras 63–68, 70 & 85).

[Bahasa Malaysia summary

Defendan, Multi-Spex Architects Sdn Bhd ('Multi-Spex') ialah sebuah syarikat yang diperbadankan di Malaysia. Plaintif, Majlis Pembangunan Wilayah Ekonomi Pantai Timur ('ECERDC') adalah sebuah badan berkanun yang ditubuhkan di bawah Akta Majlis Pembangunan Wilayah Ekonomi Pantai Timur 2008 dengan objektif, antara lain, menyediakan hala tuju, dasar dan strategi yang betul berhubung dengan pembangunan dalam Wilayah Ekonomi Pantai Timur yang terdiri daripada Negeri Kelantan, Terengganu, Pahang dan Daerah Mersing dalam Negeri Johor. Melalui satu kontrak pembinaan, ECERDC telah melantik Pembinaan SPK Sdn Bhd ('PSPK') sebagai kontraktor utama bagi satu projek dan tujuannya adalah untuk membasmi kemiskinan dengan membina bangunan untuk unit pengeluaran haiwan ('APU') untuk penternakan biri-biri, kemudahan sokongan, perumahan dan kemudahan komuniti untuk penempatan semula penduduk kampung. Terdahulu, melalui surat pelantikan ('LOA'), ECERDC telah melantik Multi-Spex sebagai perunding utama untuk perancangan induk dan reka bentuk terperinci bagi projek itu. Terma dan syarat pelantikan telah dinyatakan dalam Lampiran 1 kepada LOA ('perjanjian perundingan'). ECERDC juga telah melantik KLCC Projeks Sdn Bhd ('KLCCP') sebagai pengurus projek. Projek ini dibahagikan kepada beberapa fasa dan pertikaian yang akhirnya timbul antara pihak adalah berkenaan dengan Fasa 1. Terdapat dua zon untuk Fasa 1 iaitu, Zon A dan Zon B. Pada Julai 2012, kerja-kerja struktur untuk semua bangunan APU telah disiapkan. Walau bagaimanapun, pada Februari 2013 dan sebelum penyerahan kepada ECERDC, kecacatan struktur dan bukan struktur ditemui di bangunan di Zon B kawasan APU. Lebih banyak kecacatan kemudiannya dikesan pada Julai 2013 pada bangunan di Zon B. Multi-Spex mendakwa bahawa kebanyakan kecacatan itu berpunca daripada pembinaan yang tidak dijalankan mengikut lukisan. Selepas itu, ECERDC mencadangkan penamatan bersama perjanjian perundingan, tetapi ini ditolak oleh Multi-Spex. Oleh itu, ECERDC mengeluarkan notis penamatan perjanjian perundingan kepada Multi-Spex. ECERDC kemudiannya mengeluarkan notis timbang tara kepada Multi-Spex. Pada tahun 2015, kecacatan dikesan lebih lanjut pada tiga daripada APU di Zon A dan Stor Pusat. Penimbang tara berpuas hati bahawa ECERDC telah berjaya membuktikan tuntutannya. ECERDC memohon untuk menguatkuasakan award timbang tara ('award') terhadap Multi-Spex ('permohonan penguatkuasaan'). Multi-Spex memfailkan untuk mengetepikan keseluruhan, atau sebahagian daripada award ('permohonan mengetepikan') atas alasan bahawa: (a) penimbang tara memutuskan perkara di luar skop hujahan kepada

timbang tara; (b) dapatan penimbang tara menunjukkan bahawa kecacatan itu timbul daripada prestasi pembinaan cerucuk yang tidak dilakukan mengikut reka bentuk dan lukisan yang menjadi skop tugas PSPK; dan (c) penimbang tara gagal mempertimbangkan skop kerja PSPK dan KLCCP dengan menghalang saksi Multi-Spex daripada merujuk kepada kontrak pembinaan. Multi-Spex juga memfailkan notis permohonan untuk diberi kebenaran untuk: (i) mengemukakan keterangan baharu bagi tujuan pendengaran permohonan mengetepikan ('permohonan keterangan baharu'); dan (ii) meminda permohonan mengetepikan ('permohonan pindaan').

Diputuskan, membenarkan permohonan penguatkuasaan; dan menolak permohonan keterangan baru, permohonan pindaan dan permohonan mengetepikan:

(1) Multi-Spex telah memetik s 37(2)(a) Akta Timbang Tara 2005 ('ATT 2005') dan A 1A, A 3 k 5 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') sebagai asas bagi permohonan dalam permohonan keterangan baharu. Walau bagaimanapun, peruntukan berkanun di mana permohonan mengetepikan itu diasaskan ialah s 37(1)(a)(v); 37(1)(b)(ii); dan 37(2)(b)(i) dan (ii); dan s 37(3) ATT 2005 sahaja. Tiada rujukan nyata dibuat kepada s 37(2)(a) ATT 2005. Oleh itu, Multi-Spex tidak boleh, dalam permohonan keterangan baharu, bergantung pada s 37(2)(a) ATT 2005 untuk mengetepikan award apabila peruntukan ini tidak pernah digunakan dalam permohonan mengetepikan pada mulanya. Bagi kebergantungan pada A 1A, A 3 k 5 dan/atau A 92 k 4 KKM 2012, tidak ada alasan yang wajar bagi mahkamah untuk menggunakan budi bicara atau kuasa yang memihak kepada Multi-Spex. Permohonan keterangan baharu itu tidak lain hanyalah percubaan untuk membicarakan semula perkara itu. Tiada asas untuk membenarkan permohonan keterangan baharu di bawah mana-mana peruntukan yang disebut oleh Multi-Spex (lihat perenggan 27–28).

(2) Permohonan pindaan adalah satu langkah taktikal oleh Multi-Spex untuk mendorong keterangan baharu bagi tujuan permohonan mengetepikan berikutan kegagalan berbuat demikian melalui permohonan keterangan baharu. Penegasan MultiSpex dalam afidavitnya pada asasnya serupa dengan pengesahan yang dibuat untuk menyokong permohonan keterangan baharu dan perkara yang sama boleh dikatakan mengenai pindaan yang dicadangkan jika dibandingkan dengan keterangan yang Multi-Spex telah cuba kemukakan melalui permohonan keterangan baharu itu. ECERDC akan terjejas secara tidak adil jika permohonan pindaan dibenarkan memandangkan pihak-pihak telah menukar semua afidavit dan penghujahan masing-masing berkenaan dengan permohonan mengetepikan dan permohonan penguatkuasaan dan pendengaran kedua-dua permohonan ini perlu ditangguhkan kerana pihak-pihak perlu bertukar afidavit dan sediakan

penghujahan bertulis tambahan untuk menangani fakta dalam cadangan pindaan yang dibangkitkan secara lambat (lihat perenggan 39).

(3) Aduan ECERDC berkaitan dengan tanggungjawab Multi-Spex yang sepatutnya dilaksanakan di tapak projek. Kecacatan yang telah didakwa berlaku dalam Fasa 1 projek yang terdiri daripada Zon A dan Zon B. Setelah mempertimbangkan pliding ECERDC dalam prosiding timbang tara, tidak ada keraguan sama sekali bahawa rujukan telah dibuat kepada kecacatan di Zon A dan Zon B dan pendirian ECERDC ialah Multi-Spex bertanggungjawab untuk kecacatan ini. Oleh itu, cabaran pertama Multi-Spex adalah tidak berasas sama sekali (lihat perenggan 60–61).

(4) Multi-Spex menegaskan bahawa penimbang tara telah mendapati bahawa kecacatan itu timbul daripada prestasi pembinaan cerucuk yang tidak dilakukan mengikut reka bentuk dan lukisan iaitu skop tugas PSPK dan bukannya Multi-Spex. Walau bagaimanapun, Multi-Spex tidak meneruskan untuk membuktikan peraturan keadilan semula jadi yang dilanggar, bagaimana ia dilanggar, bagaimana pelanggaran itu berkaitan dengan penghasilan award dan bagaimana pelanggaran itu menjejaskan haknya. Tribunal telah mempertimbangkan pendapat Multi-Spex bahawa kerja-kerja yang cacat itu disebabkan oleh pembinaan PSPK. Hujahan bahawa penimbang tara telah melanggar peraturan keadilan semula jadi dan s 20 ATT 2005 dengan tidak membenarkan Multi-Spex merujuk kepada perjanjian pembinaan telah dipertimbangkan dan diputuskan oleh mahkamah sebagai tidak berasas sama sekali kerana Multi-Spex telah mengasingkan hanya sesi tersebut pada perbicaraan timbang tara tersebut. Contoh khusus ini pastinya tidak menyebabkan Multi-Spex dihalang daripada merujuk kepada kontrak pembinaan. Multi-Spex diberi peluang lain untuk mengemukakan kesnya mengenai kontrak pembinaan semasa perbicaraan timbang tara. Multi-Spex diberi peluang yang luas untuk membentangkan kesnya termasuk mengemukakan, antara lain, bahawa KLCCP bertanggungjawab ke atas tugas penyeliaan kerja-kerja dan bukannya Multi-Spex. Berdasarkan premis tersebut, tiada merit apa-apa pun untuk kedua-dua alasan cabaran ini. Oleh itu, Multi-Spex tidak membuktikan keperluan undang-undang dalam percubaannya untuk mengetepikan award (lihat perenggan 63–68, 70 & 85).]

Cases referred to

BLB v BLC [2013] 4 SLR 1169, HC (refd)
Chen Chow Lek v Tan Yew Lai [1983] 1 MLJ 170, FC (refd)
Dato' Tan Heng Chew v Tan Kim Hor and another appeal [2009] 5 MLJ 790, CA (refd)
Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2015] 8 CLJ 1, FC (refd)

Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd [2019] MLJU 1755; [2019] 6 CLJ 588, CA (refd)
Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application [2011] 7 MLJ 539, HC (refd)
Iskandar Regional Development Authority v SJIC Bina Sdn Bhd [2020] MLJU 566, HC (refd)
Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (folld)
Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another Summon [2020] MLJU 660; [2020] 1 LNS 528, HC (refd)
Joseph bin Paulus Lantip & Ors v Unilever Plc [2018] supp MLJ 151; [2012] 7 CLJ 693, FC (refd)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (folld)
Kerajaan Malaysia v Syarikat Ismail Ibrahim Sdn Bhd & Ors [2020] MLJU 52; [2020] 1 LNS 40, CA (refd)
Klass Corporation (M) Sdn Bhd v MKRS Management Sdn Bhd [2016] 4 CLJ 438, HC (refd)
Kyburn Investments Ltd v Beca Corporate Holdings Ltd [2015] 3 NZLR 644, CA (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, FC (refd)
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR 597; [2006] SGCA 41, CA (folld)
Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1, FC (refd)
Ponnusamy & Anor v Nathu Ram [1959] 1 MLJ 228; [1959] 1 LNS 73 (refd)
SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case [2020] MLJU 2366, HC (folld)
Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd [2018] 3 MLJ 608, CA (folld)
The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149, HC (refd)
Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and others [1998] 3 WLR 770, QBD (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] CLJ Rep 428, FC (folld)
Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai [1981] 2 MLJ 21, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 20, 36(1), 37, 37(1)(a), (1)(a)(v), (1)(b)(ii), (2)(a), (2)(b)(i), (2)(b)(ii), (3), 38, 39(1)(b)(ii)
Companies Act 1965 (repealed by Companies Act 2016)
Construction Industry Payment and Adjudication Act 2012

East Coast Economic Region Development Council Act 2008
Rules of Court 2012 O 1A, O 3 r 5, O 20 rr 5, 7, O 92 r 4

Mohd Hafizuddin Khan bin Norkhan (Hafiz Norkhan & Co) for the plaintiff.
T Kuhendran (with Esther Tan and Delvin Singh Mangat) (Zul Rafique & Partners) for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] These grounds of judgment are in relation to the following applications and decisions of the court:

(a) the notice of application ('NoA') in encl 14 of Originating Summons No WA-24C(ARB)-27–08 of 2020 dated 11 August 2020 ('OS No 27') by Multi-Spex Architect Sdn Bhd ('Multi-Spex') pursuant to para 37(2)(a) of the Arbitration Act 2005 ('the AA 2005');

(b) O 1A, O 3 r 5 and/or O 92 r 4 of the Rules of Court 2012 ('the RoC 2012'); and/or the inherent jurisdiction of the court to, among others, be given leave to adduce fresh evidence for purposes of the hearing of OS No 27 ('fresh evidence application'), which is Multi-Spex's application to set aside the award dated 13 May 2020 ('award') by the learned arbitrator, Dato' Yeo Yang Poh ('arbitrator'). This application was dismissed with costs of RM5,000;

(c) the NoA in encl 32 of OS No 27 by Multi-Spex pursuant to O 20 rr 5 and 7 of the RoC 2012 and/or the inherent jurisdiction of the court to be given leave to amend OS No 27 as proposed in *Lampiran A* to the NoA ('amendment application'). This application was dismissed with costs of RM3,500;

(d) the application by Multi-Spex pursuant to subparas 37(1)(a)(v); 37(1)(b)(ii); and 37(2)(b)(i) and (ii); and sub-s 37(3) of the AA 2005 to set aside the entire, or part of the, award ('setting aside application'). This application was dismissed with costs of RM10,000 subject to allocatur; and

(e) the application by East Coast Economic Region Development Council ('ECERDC') pursuant to s 38 of the AA 2005 and/or the inherent jurisdiction of the court to enforce the award by entry as a judgment against Multi-Spex ('enforcement application'). This application was allowed with costs of RM10,000 subject to allocatur.

[2] As would be expected following from the aforementioned decisions, Multi-Spex is currently pursuing an appeal against the same. The full reasons

for the decisions in respect of all four applications are provided herein below.

SALIENT BACKGROUND FACTS

[3] Multi-Spex is a company incorporated in Malaysia under the Companies Act 1965 (Act 125) and having a registered address at No 16–1, Jalan 2/23A, Taman Danau Kota, Off Jalan Genting Kelang, 53300 Kuala Lumpur and a business address at No 5–1, Jalan 15/48A, Sentul Raya Boulevard, Off Jalan Sentul, 51000 Kuala Lumpur.

[4] The ECERDC is a statutory body established on 13 June 2008 under the East Coast Economic Region Development Council Act 2008 (Act 688) with the objective of, inter alia, providing for the proper direction, policies and strategies in relation to the development within the East Coast Economic Region comprising of the States of Kelantan, Terengganu, Pahang and the District of Mersing in the State of Johor. The ECERDC has its registered address at Level 22, Menara 3 Petronas, Kuala Lumpur City Centre, 50088 Kuala Lumpur.

[5] By a contract dated 6 September 2010 ('construction contract'), ECERDC had appointed Pembinaan SPK Sdn Bhd ('PSPK') as the main contractor for 'The Proposed Construction And Completion Of One Hundred (100) Units Of Houses, Five (5) Units Of Management Quarters, Amenities, Fifty Two (52) Animal Production Units (APU), Fodder Plot And Other Associated Facilities And Infrastructure Works For The Development Of Besut Setiu Agropolitan (BSA) Project' at Panchur Bederu, Setiu, Terengganu ('the project'). The aim of the project is to eradicate poverty by constructing buildings for Animal Production Units ('APU') for sheep-rearing, support facilities, housing and community facilities for the resettlement of villagers at the said area in Setiu.

[6] Earlier, by way of a letter of appointment ('LoA') dated 1 March 2010, ECERDC had appointed Multi-Spex as the Principal Consultant for the Master Planning and Detailed Design for the project. The terms and conditions of the appointment are set out in Annexure 1 to the LoA ('consultancy agreement'). Multi-Spex's obligations are particularised in article 3.0 of the consultancy agreement whilst the Scope of Services can be seen in Attachment B To Annexure 1.

[7] ECERDC had also appointed KLCC Projeks Sdn Bhd ('KLCCP') as the project manager until 6 January 2014. In the course of the project, KLCCP had enlisted Dr CT Toh, a geotechnical engineer who had made recommendations on the piling options.

[8] Multi-Spex had engaged several supporting consultants for the project, one of which is JNA Ikhtisas Sdn Bhd ('JNAI'), the Civil and Structural Engineering Supporting Consultant.

[9] The project is divided into phases and the dispute which eventually arose between the parties is in respect of Phase 1. There are two Zones for Phase 1 namely, Zone A and Zone B.

[10] In July 2012, the structural works for all APU buildings were completed. However, in February 2013 and before the handover to ECERDC, structural and non-structural defects were discovered at the buildings in Zone B of the APU area. More defects were detected in July 2013 to the buildings in Zone B.

[11] A report and recommendations for the proposed rectification of defective works were duly prepared. Multi-Spex alleged that most of the defects were attributable to construction that was not carried out in accordance with the drawings.

[12] On 6 August 2013, ECERDC appointed ARUP Juruperunding Sdn Bhd ('ARUP') to investigate the defective works.

[13] ECERDC wrote to Multi-Spex on 18 December 2013, stating that '... preliminary finding on the cause of these serious defects points to faults in the design and/or workmanship of the installed piles. The piles have been shown to be inadequate to support the column load ...' and that Multi-Spex was '... obliged as the Principal Consultant, to design and supervise or ensure that the design and supervision of the works is carried out with skill, care and diligence'. Multi-Spex was asked to provide a written explanation within 14 days on how it had allowed this situation to occur.

[14] In the Final Inception Report dated 6 June 2014, ARUP opined that '... the design criteria have not been met as the pile carrying capacity or safety factor are not in accordance with the design intent. There are elements of lack of design checks/calculations by the designer whereby some important design issues such as settlement, Negative Skin Friction and eccentric loadings were not adequately addressed in the design. There are also issues in relation to poor construction workmanship which did not comply with the designer's requirements and the works have proceeded without being rejected/rectified. Poor workmanship is believed to be the main probable cause of damages/failure'.

[15] Thereafter, ECERDC proposed for mutual termination of the consultancy agreement, but this was rejected by Multi-Spex. Hence, on 29

August 2014, ECERDC issued the Notice of Termination of the consultancy agreement to Multi-Spex.

[16] ECERDC then appointed RPM Engineers Sdn Bhd ('RPM') as the Principal Consultant on 19 September 2014 and MEC Jati Consortium Sdn Bhd ('MEC Jati') as the Remedial Works Contractor on 3 September 2015.

[17] ECERDC issued a notice of arbitration to Multi-Spex on 15 October 2014.

[18] Sometime in 2015, defects were detected at three of the APU in Zone A and the Central Store.

[19] The statement of claim ('SoC') dated 16 November 2015 was amended twice. In the re-amended SoC dated 26 February 2018, ECERDC basically claimed that it has suffered loss and damage due to Multi-Spex's negligence and breach of contract in the performance of its services. In particular, ECERDC pleaded that it had to appoint a contractor and others to remedy the serious defects, the costs of which amounts to RM10,435,704.60 and that it has suffered and continues to suffer losses in light of the delay caused in completion of the works.

[20] In its amended statement of defence and counterclaim dated 9 September 2016, Multi-Spex stated that the notice of termination is invalid and/or void and contended that ECERDC had breached the LoA by failing, refusing and/or neglecting to pay the outstanding professional fees in the sum of RM1,776,573.81. Multi-Spex counterclaimed for this amount together with damages, interests and costs.

[21] The arbitrator delivered the award on 13 May 2020 ('award') whereby in the operative part of the same, he determined that:

> 6.1 The Tribunal is satisfied that the Claimant has successfully proved its claims. The sum of RM10,435,704.60 (see para 5.39 above), being loss incurred by the Claimant, is hereby awarded in favour of the Claimant; to be payable forthwith by the Respondent, together with interests thereon at the rate of 5% per annum calculated from 15.10.2014 (the date of commencement of referral to arbitration) to the date of full realisation.
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> 6.2 For the reason already explained, the Respondent has failed to prove its counterclaim; which counterclaim is accordingly dismissed.
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> 6.3 The Tribunal is informed that no Caldebank offer had been made by any party to the other. Having considered all relevant matters (including the costs of the Tribunal paid by the parties, legal costs incurred, fees paid to experts, and other costs incurred by the parties, supporting documents of which have been furnished to the

Tribunal); the Tribunal further awards costs in the sum of RM800,000.00 in favour of the Claimant; to be payable forthwith by the Respondent.

...

[22] On the issue of the quantum of ECERDC's loss, the arbitrator found that:

5.38 The Tribunal is satisfied that the quantum of the loss incurred and claimed by the Claimant (in rectifying the defects) is genuine and reasonable; and has been proven with documentary evidence produced by the Claimant (and referred to with considerable detail in para 229 of the CWS dated 15.10.2018).

5.39 The Claimant's loss of RM10,435,704.60 is made up of the following:

– RM9,415,956.51 being the contract sum of MEC Jati Consortium Sdn Bhd in carrying out the rectification works, after deducting the costs of surcharge work for Phase 2;

– RM784,349.18 being RPM's consultancy fees, and

– RM235,398.91 being KPK's fees.

The fresh evidence application (encl 14)

[23] In the NoA, Multi-Spex applied for leave to adduce fresh evidence being:

(a) the NoA to amend the defence dated 10 July 2018 and the affidavit in support ('AIS') affirmed by Maszeallan bin Mohamad, the Chief Executive Officer on 20 July 2018, and filed by PSPK on 10 July 2018 and 20 July 2018, respectively, in Terengganu Sessions Court Civil Suit No TA-B52NCvC–5–04 of 2018 ('Suit No 5') between Mohd Noh bin Chik and Mohamad bin Mat Hassan, both trading as Suno Jaya Enterprise as the plaintiff and PSPK as the defendant (see exh 'Z1' in Multi-Spex's AIS, encl 15); and

(b) the Common Bundle of Documents filed on 22 January 2019 in Suit No 5 (see exh 'Z2' in encl 15), specifically the letter dated 23 May 2018 issued by ECERDC to PSPK ('23 May 2018 letter') and the Appendices thereto ie the Certificate of Partial Occupation ('CPO') issued on 23 May 2018 (Appendix 1), Certificate of Practical Completion ('CPC') issued on 23 May 2018 (Appendix 2) and Statement of Final Account ('SoFA') proposed by KLCCP on 17 May 2018 and checked and approved by ECERDC on 18 May 2018 (Appendix 3).

Multi-Spex's submissions

[24] In the AIS affirmed by its Director, Zulkhairi bin Md Zain on 23 September 2020, Multi-Spex narrated the events which led to the filing of the fresh evidence application:

(a) on 17 September 2020, a discussion regarding ECERDC's affidavit in reply ('AIR') was held at the office of the solicitors for Multi-Spex and the deponent informed the solicitors that one Mohamad Hadi bin Tuan Ismail, an ex-employee of Multi-Spex. had told the deponent that he is a witness in a case in Terengganu where PSPK is the defendant. Hadi also said that PSPK has to pay a sum of approximately RM13m to ECERDC;

(b) the deponent then obtained the case number for the Terengganu suit from Hadi and relayed the information to the solicitors; and

(c) on 18 September 2020, the solicitors had conducted a file search and came to know about the documents as set out in para 23 above.

[25] It is Multi-Spex's submission that:

(a) the gist of para 37(1)(a) of the AA 2005 allows it to provide further proof in the form of new evidence as envisaged in the fresh evidence application. The court also has the inherent jurisdiction to allow the same in the interest of justice as provided under O 1A, and O 92 r 4 of the RoC 2012;

(b) the 23 May 2018 letter, CPC and SoFA ought to be admitted as further evidence upon its discovery as it would not prejudice ECERDC who, at all times, had knowledge and possession of these documents. Moreover, ECERDC shall have the right to reply to the contents of these documents; and

(c) the fresh evidence ought to have been disclosed by ECERDC during the arbitration proceedings to show that it has recovered its losses from PSPK. Any demand then made against Multi-Spex pursuant to the award would be a double recovery and/or unjust enrichment. ECERDC had concealed the documents during the arbitration proceedings in order to deceive the arbitrator and the making of the award was thus induced or affected by fraud or corruption under para 37(2)(a) of the AA 2005 or otherwise in breach of the public policy of Malaysia as a breach of natural justice has occurred during the arbitral proceedings or in connection with the making of the award.

ECERDC's submissions

[26] ECERDC gave three reasons as to why the fresh evidence application ought to be dismissed, namely that:

(a) the fresh evidence application is made pursuant to a new ground which was not raised by the plaintiff in the setting aside application;

(b) the setting aside application is not an appeal and Multi-Spex is not entitled to adduce fresh evidence; and

(c) Multi-Spex has not fulfilled the conditions to justify the reception of fresh evidence.

Analysis and findings of the court

[27] Having read the cause papers and written submissions by the parties and giving consideration to the same together with the oral submissions by the learned counsels who appeared for the parties on the date of hearing, I had dismissed the fresh evidence application for the following reasons:

(a) *the statutory basis for the fresh evidence application*:

Multi-Spex had cited para 37(2)(a) of the AA 2005 and O 1A, O 3 r 5 and/or O 92 r 4 of the RoC 2012 as the basis for the application in encl 14.

Paragraph 37(2)(a of the AA 2005 reads:

> 37 Application for setting aside
>
> ...
>
> (2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> ...

Whilst subpara (1)(b)(ii) of the AA 2005 states that:

> 37 (1) An award may be set aside by the High Court only if –
>
> ...
>
> (b) the High Court finds that —
>
> ...
>
> (ii) the award is in conflict with the public policy of Malaysia.

However, it is evident from encl 1 in OS No 27 that the statutory provisions on which the setting aside application is founded are subparas 37(1)(a)(v); 37(1)(b)(ii); and 37(2)(b)(i) and (ii); and sub-s 37(3) of the AA 2005 only. The same provisions are found in paras 18 and 19 of encl 1 which set out the grounds to support the OS. No express reference is made to para 37(2)(a) AA

2005. Hence, Multi-Spex cannot, in the fresh evidence application, rely on para 37(2)(a) of the AA 2005 to set aside the award when this provision was never invoked in the setting aside application in the first place.

Furthermore, in seeking a dismissal of the enforcement application, Multi-Spex averred in para 21 of its AIR (encl 4) that there is a breach of natural justice and '... ini telah menjurus kepada suatu keputusan Adjudikasi yang salah dan tidak adil yang membawa ketidakadilan yang cukup besar ... kepada Defendan yang jatuh dibawah seksyen 39(1)(a)(iv) dan/atau (vii), Akta Timbang Tara 2005 ...'. The two grounds invoked by Multi-Spex in resisting the Enforcement Application are clearly that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration and/or, the incomprehensible ground that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made. No reference is made to subpara 39(1)(b)(ii) of the AA 2005 which is the ground that the award is in conflict with the public policy of Malaysia.

Apart from these facts, there appears to be either a lack of understanding or an attitude of indifference to the correct terms to be used when the decision sought to be set aside is an award pursuant to an arbitration proceeding and not an adjudication decision made by an adjudicator pursuant to the Construction Industry Payment and Adjudication Act 2012 (Act 746). In the same AIR as above mentioned, Multi-Spex has wrongly referred to the arbitrator as the 'Adjudikator', the award as the 'Keputusan Adjudikasi' and the amount awarded by the arbitrator as 'Amaun Kuantum Keputusan Adjudikasi'.

As for the reliance on O 1A, O 3 r 5 and/or O 92 r 4 of the RoC 2012, Multi-Spex is appealing to this court to have regard to the overriding interest of justice, to exercise its discretion to extend or abridge time and/or to invoke its inherent powers to make any order so as to prevent injustice. However, I found that there is no justifiable reason for the court to exercise the discretion or the powers in favor of Multi-Spex as will be explained in the succeeding subparas;

(b) *the setting aside application is not an appeal*:

It is trite law that an application to set aside an award is not an appeal and an applicant is not allowed to re-litigate the merits of the award (see the decision of the Federal Court in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1, *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539, *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd* [2019] MLJU 1755; [2019] 6 CLJ 588 and *Iskandar Regional Development Authority v SJIC Bina Sdn Bhd* [2020] MLJU 566).

In the instant case, Multi-Spex was given every opportunity to defend itself against the claim by ECERDC and to advance its own arguments for the

counterclaim. A perusal of the amended statement of defence and counterclaim, notes of proceedings ('NoP') and Multi-Spex's written submission in the arbitration proceedings are testament of this fact. I agree with ECERDC's contention that the fresh evidence application is nothing but an attempt to re-litigate the matter;

(c) *has Multi-Spex fulfilled the requirements for the reception of fresh evidence?*

Whilst Multi-Spex's arguments are premised on the notions of its 'right' to the admittance of fresh evidence and that truth should prevail in the interest of justice, it has not alluded to the requirements to justify the reception of fresh evidence in the first place and the fact that the onus lies on Multi-Spex to fulfil such requirements.

It was thus left to the counsel for ECERDC to submit that the conditions to justify the reception of fresh evidence to disturb the award are essentially similar to those relating to the introduction of fresh evidence to challenge a judgment of the court (see *Ladd v Marshall* [1954] 3 All ER 745 and *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and others* [1998] 3 WLR 770 as referred to in *Iskandar Regional Development Authority*) and these are as follows:

(i) if it is shown that the evidence could not have been obtained with reasonable diligence for use in the arbitration proceedings;

(ii) if the further evidence is such that, if given, it would probably have an important influence on the result of the arbitration, though it need not be decisive; and

(iii) if the evidence is such as is presumably to be believed.

With regards to requirement (i), in para 14 of ECERDC's AIR (encl 20), it was affirmed that:

> (a) The Plaintiff already had knowledge of the suit in Terengganu against PSPK as evident in their written submissions which was submitted on 28.3.2019. See amongst others paragraphs 167 and 168 of the submissions.
>
> (b) I verily believe that the Plaintiff had knowledge of the letter dated 23.5.2018 as early as 2019, and therefore this letter could not be construed as fresh evidence.

Paragraphs 167 and 168 of Multi-Spex's written submission for the arbitration read as follows:

> 167. Respondent also were made known that certificates of practical completion (CPC) was issued by Claimant to SPK Sdn. Bhd. In 2018 for the works done by the new contractor and with a final account in negative of approximate of RM13 million.
>
> 168. An action was also initiated by a sub-contractor against SPK Sdn Bhd because on non-payment by Claimant for work done within this contract. We foresee that this is the first from a series of actions to be taken against SPK Sdn Bhd..

Based on the above evidence, Multi-Spex had knowledge of Suit No 5 at the time when the arbitration proceeding was still afoot and it could have easily conducted a file search at that time but it chose to do so only on 18 September 2020. ECERDC's written submissions for the arbitration is dated 15 October 2018 while Multi-Spex's written submission is undated but according to ECERDC, it was submitted on 28 March 2019. The NoA to amend the defence and the AIS in Suit No 5 were filed by PSPK in July 2018. The CPC was issued on 23 May 2018 and the SoFA was signed in mid-May 2018. Considering these dates, in my opinion, there is merit to ECERDC's submission that, with reasonable diligence, Multi-Spex could have been obtained the evidence for use in the arbitration proceedings. Even if the witnesses had completed giving their evidence and the arbitration proceeding was at the stage for preparation of written submissions, Multi-Spex could, and should, have made an application to the arbitrator for new or fresh evidence to be admitted.

Moving on to requirement (ii), M Hafizuddin had drawn the attention of the court to the fact that the subject of ECERDC's claim against Multi-Spex in the arbitration is that Multi-Spex had caused major defects in Zone B and the Central Store, and that the amount claimed by ECERDC and awarded by the arbitrator as costs to remedy the defects is RM10,435,704.60 with the breakdown as stated in para 5.39 of the award (see para 22 above). The learned counsel also highlighted the following parts in the 23 May 2018 letter, the CPC and the SoFA:

The 23 May 2018 letter:

> We refer to the contract for the above Project dated 1 December 2010 ('Contract').
>
> In order to close the Contract, the management of ECERDC has decided as follows:
>
> ...
>
> (5) Zone B
>
> (i) Due to major defects in Zone B, you have been instructed not to carry further Works thereat since 6 August 2013. We have appointed a third party contractor to have the said Works rectified. The rectification work has now been completed.
>
> (ii) Additional costs in relation to the rectification work is to be deducted from the Contract Sum and the same is reflected in the attached Statement of Final Account.
>
> (6) Central Store & Wheel Dip
>
> (i) These Works were rejected due to major defects.
>
> (ii) We have appointed a third party to rectify these Works. The rectification work has now been completed.

(iii) Additional costs in relation to the rectification work is to be deducted from the Contract Sum and the same is reflected in the attached Statement of Final Account.

...

The CPC:

...

In accordance with Clause 39 of the Conditions of Contract and subject to the completion of any outstanding work and the making good of any defects, imperfections, shrinkages or any other faults whatsoever as required under Clause 45 of the Conditions of Contract and which may appear during the Defects Liability Period, it is hereby certified that the whole of the Works as mentioned above were completed on 15 December 2016 with the following qualifier:

ECERDC hereby accepts the Works and hereby issue this Certificate of Practical Completion. The outstanding work not completed by the Contractor and/or the defective works done by the Contractor as detailed in Attachment A hereto have been completed by a third party or given diminutive value as detailed in the Statement of Final Account.

The Defects Liability Period in respect of the said Works began on 15 December 2016 and has ended on 14 December 2017

...

The SoFA:

Item 3.4 under 'Deductions' shows that a sum of RM13,178,815.40 was deducted for 'Defective Works — Major Defects Rectified by 3rd Parties' and Item 7.0 for 'Nett Amount Payable' shows a negative value of RM13,098,613.62.

In the documents for 'Defective Works After Completion', the major defect works were listed followed by these details:

1. Investigation Works (RM892,048.29) Arup
2. Independent Checker (RM114,622.98) Ir Yee
3. Rectification works for major defects in Zone B & Central Store
– Remedial Works-Contractor (RM9,473,557.46) Mec Jati Sdn Bhd
– Design & Supervision-Principal Consultant (RM1,881,278.86) RPM
– PMC (RM1,179,435.00) Aecom.

Based on the above excerpts, Multi-Spex contended that the gist of the setting aside application is that the arbitrator had breached the principle of natural

justice by not according equal treatment to the parties as stipulated in s 20 of the AA 2005 as he did not allow Multi-Spex to refer to the construction contract (referring to the NoP for the 11th Tribunal proceedings on 15 August 2017) whereby Multi-Spex took the position that the major defects in Zone B and the Central Store were caused by PSPK. The arbitrator found that the defects did not arise from the performance and design of the piles, which is Multi-Spex's scope of duty, but the defects arose from the performance of the construction of the piles which was not done in accordance with the design and drawings, which is PSPK's scope of duty. Multi-Spex asserted that the fresh evidence, specifically the SoFA, would absolve Multi-Spex of its obligations under the consultancy agreement and the arbitrator's findings against Multi-Spex in respect of its breaches under the consultancy agreement because ECERDC has deducted the sum of RM13,178,815.40 in the SoFA for rectification works by third parties for major defects in Zone B and the Central Store out of the contract awarded to PSPK for the original contract sum of RM59,969,696.90. According to Multi-Spex, if the fresh evidence is not allowed to be adduced and the allegedly excessive quantum of the award is not set aside, ECERDC would be unjustly enrich and there would be a violation of the basic notions of morality and justice akin to the findings of this court in *Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another Summon* [2020] MLJU 660; [2020] 1 LNS 528.

My views on the contentions of the parties are these:

Firstly, as to the complaint that the arbitrator had prevented Multi-Spex from referring to the construction contract, I have perused the NoP dated 15 August 2017 when Multi-Spex's second witness, Ir Jazlan bin Ahmad, was giving his testimony and I am unable to agree with Multi-Spex that this a true account of what had transpired during the arbitration proceedings. All that the arbitrator did was to point out that the construction contract is not the subject matter of the arbitration and that PSPK is not part of the arbitration. The arbitrator further explained that a person can have multiple contractual relationship with many people and under each contract, the reciprocal responsibilities may be different.

Secondly, as to the arbitrator's findings, the relevant section of the award which relates to Multi-Spex's submissions can be found in 'Part B.1 Cause(s) of the defects' wherein the arbitrator discussed the issues on Ground-treatment v Piling, The pile-design, The pile-construction and *Use of non-suspended slabs for the APUs* and concluded, inter alia, that:

(i) Multi-Spex's suggestion that ECERDC wrongly chose the piling option instead of ground treatment was misplaced and in terms of causation, nothing turns on the mere fact that the piling option was chosen over ground-treatment;

(ii) there is no convincing evidence that JNAI's pile-design was inadequate and this is fortified by the fact that JNAI's pile design was reviewed and approved by Dr. Toh, on whom ECERDC had, at all material times, strongly relied without expressing any reservation. With this finding, the arbitrator was of the view that there is no necessity for him to address Multi-Spex's argument whether the advisory intervention by Dr Toh had, in fact or in law, relieved Multi-Spex of its responsibility. Nevertheless, the arbitrator went on to consider Multi-Spex's submission on its entitlement to invoke the second part of article 3.4 of the consultancy agreement which states:

> ... The Principal Consultant in consultation with the Client and KLCCPSB shall co-ordinate the works of other specialist consultant(s) appointed directly by the Client, throughout the period of the Project but shall not be held responsible for their performance or any defects or liabilities arising from their performance unless the defects or liabilities are attributable to the act, omission, neglect or default of the Principal Consultant.

however it was answered in the negative because factually and legally, the arbitrator found that Dr Toh was directly appointed by Multi-Spex and the defects did not arise from Dr. Toh's design of the piles;

(iii) there is an abundance of evidence that the construction of the piles was fraught with many issues and they converged towards a finding that the defects in the structures were caused by flawed, defective or improper construction. This finding led the arbitrator to enquire into the issue of *under whose supervision was such defective construction allowed to have been carried out*. The arbitrator's analysis of this issue can be seen in *Part C* of the award on 'Responsibility of supervision of construction' and his findings are summarised as follows:

> 4.26 ...
>
> (a) There were serious defects in the structures erected in Phase 1 of the Project.
>
> (b) Those defects were caused by improper construction, poor workmanship, and defective materials.
>
> (c) The faulty construction was performed under the Respondent's supervision.
>
> (d) The Respondent had failed to satisfactorily discharge both its contractual obligation its statutory duty to properly supervise the construction works in the Project.
>
> (e) There is no evidence of any nature to show that the Respondent had exercised or employed reasonable care and skill, in supervising construction works, that is required at common law; let alone fulfilling the higher standard it had contracted to meet under the Consultancy

Agreement (for which see its Article 3.7: 'The Principal Consultant shall *ensure the highest quality of workmanship* and that only approved materials are used by the Contractors').

(f) In any event, the Respondent had covenanted, in the Consultancy Agreement, to be liable to the Claimant for all defective works performed by the Supporting Consultants. The Respondent had further undertaken to fully indemnify the Claimant against any and all loss which the latter may suffer, as a result of any defective works.

(g) The Respondent's liability for the actions and omissions of the Supporting Consultants is firmly established in contract; in addition to the Respondent's responsibility under the principle of vicarious liability in tort.

4.27 In the circumstances, it can be concluded that, barring any available valid defence, the Respondent is liable to the Claimant, both in contract and tort, for the loss suffered by the Claimant as a result of having to rectify the defects in the said structures.

It is pertinent to note that in assessing Multi-Spex's arguments as to why it is not responsible for supervising the construction works and/or for poor services performed by the Supporting Consultants and in concluding that these are 'clearly untenable and baseless', the arbitrator had pointed out in subpara 4.15(e) of the award that the construction contract is '... independent of the Consultancy Agreement. The Respondent is not privy to the former. The Building Contract has nothing to do with the Respondent. The contractual relationship between the Claimant and the Respondent is governed solely by the Consultancy Agreement; in which its Article 29 expressly stipulates an 'entire agreement' provision'.

The arbitrator had also examined Multi-Spex's defences under the headings 'Fitness for purpose', 'Prevention of supervision or investigations?', 'Was the Consultancy Agreement lawfully terminated?', 'Delay, mitigation & betterment' and 'Quantum of the Claimant's loss' and made findings of fact and/or of law which were ultimately not in Multi-Spex's favor.

Judging from the award, the Tribunal had considered Multi-Spex's contentions that the defective works were caused by PSPK's construction works and the pivotal question ie 'under whose supervision was such defective construction allowed to have been carried out' was asked. The answer to this question was arrived at by reference to the contractual provisions under the consultancy agreement, which is the contract that governs the relationship between Multi-Spex and ECERDC. The arbitrator also considered Multi-Spex's argument that the consultancy agreement applied only to the 'pre-construction' period but found that it was unsubstantiated.

In para 15 of its AIR (encl 20), ECERDC affirmed that the 23 May 2018 letter and its attachments were issued to PSPK in order to close the construction

contract and that the CPC was issued with the qualification that the outstanding and/or defective works were completed by a third party or given a diminutive value in the SoFA. The averment as to the CPC is supported by the wordings in the CPC as quoted earlier.

ECERDC further affirmed that contrary to Multi-Spex's allegation that deduction has been made in PSPK's final account in respect of the remedial works, upon issuance of the SoFA, PSPK had in fact written to ECERDC vide letter dated 25 October 2018, disputing the final account, and denying its liability to pay any sum as it takes the position that the serious defects were caused by design issues. The salient part of the said letter in exh 'AA2' is re-produced below:

> ...
>
> Herewith we would like to express our disappointment that the contract final summary given is not equal as per our recorded earlier. This is not a Design and Build Contract therefore any failure due to the design or anything related to the design shall not constitutes any failure from our side.
>
> As we go through the bills, we recognized that the re-measurement column has been established and claimed by you. Should we recall, there is also no evidence and proof that we had exercises any joint measurement with your part. We strongly believe that the joint measurement was conducted without our authorized representative. In addition there are no sign that all consultants involved in this project had given their justification either in the remeasurement works or final account. In other word, all the justifications was derived from only you.
>
> We required fair judgment to be given to all parties involved therefore, we had called all of our sub-contractors to defend their claims in lieu of your contract closure. The effort is actually to ensure each parties involved in this project will get a fair justifications. Not to mentions as they had experiences loses in lieu of late payment from your part.
>
> However, as the discussions and negotiations takes place, and until all this disputed issues resolve, we hereby takes the last final account given to you on June 2013 as final and closed.

Hence, Multi-Spex's contention that ECERDC is unjustly enriching itself by double claims is unfounded. As submitted by Mr T Kuhendran by citing the following passage from *Hudson's Building and Engineering Contract* (13th Ed, Sweet & Maxwell Ltd, 20150 by Nicholas Dennys and Robert Clay at p 295 (with my added emphasis), it is of no defence to Multi-Spex that the right of action should have been against PSPK as ECERDC has the right to choose to proceed against PSPK and/or Multi-Spex based on the contract/agreement that ECERDC has executed with each party in order to recover, amongst others, the cost of the remedial works:

> *If an Employer succeeds in establishing a breach of duty to supervise*, so that defective work escapes attention, *it is no defence against the Employer that it may in addition to their action for professional negligence also have a right of action against the builder. The*

Employer may choose to proceed against either or both and secure judgment for the whole sum in each case, notwithstanding that the measure of damage, namely the cost of repair may be identical.

In the premises, the SoFA is of no relevance to the subject matter of the arbitration and would not have influenced the arbitrator's decision. It would not have absolved Multi-Spex of its obligations under the consultancy agreement and the findings made in the award against Multi-Spex in respect of the breaches under the consultancy agreement.

Multi-Spex has not come anywhere close in proving the second requirement for the reception of fresh evidence namely, that the new evidence is such that, if given, it would probably have an important influence on the result of the arbitration.

[28] There is no basis to allow the fresh evidence application under any of the provisions as cited by Multi-Spex in encl 14 and the same was therefore dismissed with costs of RM5,000, subject to allocatur.

The amendment application (encl 32)

[29] 18 days after this court dismissed the fresh evidence application, Multi-Spex filed the amendment application and a Certificate of Urgency (encl 34) to, among others, be given leave to amend the OS in encl 1 in the manner as underlined in red in the 'Saman Pemula Terpinda Yang Dicadangkan' which is enclosed as Lampiran A to the NoA. A scrutiny of Lampiran A reveals that the major amendment proposed by Multi-Spex is to insert the following new paras in the OS:

21. Bahawa dari satu Statement of Final Account bertarikh 17.5.2018 beserta lampirannya iaitu senarai Final Measurement of Main Contract (Defective Works After Completion) tersebut Defective Works-Major Defects Rectified by 3rd Parties yang dilampirkan bersama surat Defendan bertarikh 23.5.2018 sebagai Appendix-3 telah menunjukkan bahawa ada penolakkan dari jumlah kontrak yang diberikan kepada PSPK terhadap jumlah pembayaran kerja-kerja pembaik-pulihan defek-defek pembinaan tersebut kepada MEC Jati Sdn Bhd, RPM Engineering dan KPK/Aecom yang di nyatakan '3.4 Defective Works-Major Defects Rectified by 3rd Parties — RM13,178,815.40'.

22. Bahawa dari senarai Final Measurement of Main Contract (Defective Works After Completion) tersebut Defective Works-Major Defects Rectified by 3*rd* Parties yang dirujuk di dalam Statement of Final Account tersebut adalah merujuk kepada MEC Jati Sdn Bhd, RPM Engineering dan KPK/Aecom bagi jumlah-jumlah seperti berikut:-

3. Rectification works for major defects in Zone B & Central Store

– Remedial Works	(RM9,473,557.46)
Contractor	Mec Jati Sdn Bhd

– Design & Supervision
– Principal Consultant (RM1,881,278.86) RPM
– PMC (RM1,179,435.00) Aecom

23. Bahawa permintaan dan/atau penolakan jumlah kuantum-kuantum pembayaran bagi kerja-kerja defek yang diberikan dibawah Award tersebut dengan jumlah penolakan kontrak PSPK bagi pembayaran bagi kerja-kerja defek tersebut yang jelas menunjukkan bahawa Defendan telah membuat tuntutan berganda 'double recovery' terhadap kerja-kerja pemulihan defek-defek yang didakwanya dari tuntutan yang dibuat dan dibawa oleh Defendan di Badan Timbang Tara tersebut dan diberikan menurut Award tersebut yang menjurus kepada elemen kekayan yang tidak adil ('unjust enrichment').

24. Bahawa tarikh akhir persidangan Badan Timbang Tara tersebut ialah pada 27.02.2018 dan Award tersebut telah diterbitkan pada 13.5.2020.

25. Bahawa surat Defendan tersebut telah dibuat pada 23.5.2018, Statement of Final Account yang melampirkan bersama senarai Final Measurement of Main Contract (Defective Works After Completion), pula telah dibuat dan dikeluarkan pada 17.5.2018.

26. Bahawa Defendan didalam Penghujahan Jawapan Defendan (Claimants' Submission in Reply) bertarikh 5.7.2019 telah menafikan dakwaan Plaintif yang dibuat didalam Penghujahan Bertulis Plaintif (Respondents' Submission) terhadap bahawa Defendan telah menuntut satu jumlah sebanyak RM13 juta dari PSPK bagi kerja-kerja pembaik-pulihan defek-defek pembinaan tersebut oleh MEC Jati Sdn Bhd, RPM Engineering dan KPK/Aecom.

27. Bahawa jelas pembuatan dan pengeluaran surat Defendan tersebut, dan Statement of Final Account yang melampirkan bersama senarai Final Measurement of Main Contract (Defective Works After Completion), segaja dibuat selepas tarikh akhir persidangan Badan Timbang Tara tersebut berakhir pada 27.02.2018 dan walaupun Award tersebut belum lagi diterbitkan Defendan menyembunyikkan kewujudan dokumen-dokumen ini dari Badan Timbang Tara dan Penimbang Tara tersebut.

28. Bahawa jelas perbuatan dan tindakan Defendan ini menjurus kepada satu percanggahan dengan polisi awam di Malaysia dan wujudnya pelanggaran ke atas keadilan asasi ketika prosiding timbang tara tersebut yang berkaitan dengan pembuatan Award tersebut yang jatuh dibawah definasi Seksyen 37(2)(b)(i) dan (ii), Akta Timbang Tara 2005 yang kini harus dipertimbangkan oleh Mahkamah Yang Mulia ini..

[30] Upon reading the proposed amendments, it is immediately apparent that Multi-Spex was attempting to achieve, through the amendment application, what it could not attain by way of the fresh evidence application. The new paras as above quoted are statements pertaining to the same facts and documents (the 23 May 2018 letter and SoFA) which were previously alleged to constitute fresh evidence.

Multi-Spex's submissions

[31] Multi-Spex relied on the cases of *Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai* [1981] 2 MLJ 21, *Chen Chow Lek v Tan Yew Lai* [1983] 1 MLJ 170 and *Dato' Tan Heng Chew v Tan Kim Hor and another appeal* [2009] 5 MLJ 790 which have established the legal principles that amendments may be allowed at any stage of the proceedings and that delay alone does not amount to prejudice and cannot defeat an application to amend.

[32] Mr Hafizuddin emphasised that the fresh evidence application and the amendment application are different applications altogether, each governed by its own set of rules and on the authority of *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] supp MLJ 151; [2012] 7 CLJ 693, Multi-Spex is not estopped from making the amendment application as the merit of the suggested amendments has yet to be heard and decided upon. The learned counsel further argued that s 37 of the AA 2005 requires a party to provide proof in a setting aside application, as such the proposed amendments are merely to provide proof for the setting aside application which arose from the previously pleaded grounds.

[33] Multi-Spex additionally highlighted that, in reply to its submission at the end of the arbitration as per para 167 (see para 27(c) above), ECERDC had submitted that Multi-Spex's allegations are '… irrelevant and not supported by evidence. As such they are clearly frivolous allegation, baseless and devoid of merit'. However, ECERDC made as about-turn, where in its affidavits for the fresh evidence application, ECERDC did not deny the existence of the SoFA with a negative RM13m sum and the documents related thereto. ECERDC is accused of having knowledge of the true state of affairs as it had prepared and issued all the related documents.

ECERDC's submissions

[34] Mr T Kuhendran submitted that there is delay in the filing of the amendment application and no reasons were given by Multi-Spex to explain the delay. The fresh evidence application was filed as early as September 2020 and Multi-Spex could have easily filed the amendment application in that month but it failed to do so. Instead, the amendment application was filed after all affidavits have been exhausted and directions have been given by the court for exchange of submission and a hearing date for the setting aside application has been fixed.

[35] It was also contended that the proposed amendments to include fresh evidence and to depose averments relying on the same are similar to the

evidence which was sought to be adduced vide the fresh evidence application, and has been dismissed by this court. Hence, with reference to the decision in *Ponnusamy & Anor v Nathu Ram* [1959] 1 MLJ 228; [1959] 1 LNS 73, the proposed amendments would be useless and ineffectual and accordingly ought to be dismissed by the court.

Analysis and findings of the court

[36] Apart from resort to the inherent jurisdiction of the court, the amendment application was made pursuant to O 20, rr 5 and 7 of the RoC 2012 which provide as follows:

> 5 Amendment of writ or pleading with leave (O 20 r 5)
>
> (1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> ...
>
> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.
>
> ...
>
> 7. Amendment of other originating process (O 20 r 7)
>
> Rule 5 shall have effect in relation to an originating summons as it has effect in relation to a writ..

[37] In determining the amendment application, I am, of course, guided by the legal principles as laid down by the apex court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428 that a judge has a discretion to allow leave to amend pleadings and this discretion must be exercised judicially. Generally, the courts would allow amendments that will not cause any injustice to the other party or parties. The questions which I must ask in deciding whether injustice would result or otherwise are whether:

(a) the amendment application is bona fide;

(b) prejudice caused to ECERDC can be compensated by costs; and

(c) the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[38] In view of the fact that the amendment application was not filed at the early stage of the proceedings for the setting aside application, but rather just two months away from the hearing date, the legal principles pronounced by the Federal Court in the other oft quoted case of *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1 are also relevant.

[39] I have considered the affidavit evidence and the written and oral submissions by the learned counsels and my findings are as follows:

(a) there is delay in the filing of the amendment application. Multi-Spex had initially chosen to treat the evidence on the SoFA as new evidence and proceeded to file the fresh evidence application. The fresh evidence application, having been dismissed, Multi-Spex then sought to place the same evidence before this court for purposes of the setting aside application by way of an amendment to the OS. All affidavits for the setting aside application have been exhausted and the hearing has been fixed on 5 March 2021. There is no cogent and reasonable explanation in Multi-Spex's affidavits as to why it did not make the amendment application from the very beginning and instead filed it so late in the day. In any event, for reasons as explicated under the fresh evidence application, the proposed amendments would do nothing to advance or strengthen Multi-Spex's arguments for the setting aside application as the SoFA bears no relevance to the subject matter of the arbitration and would not have influenced the arbitrator's decision in any way. In the same vein, the probable consequences of the amendment application, if it is allowed, would be of no utility to Multi-Spex. Moreover, the court had earlier concluded that Multi-Spex's submission on the point which relates to unjust enrichment is completely unfounded.

In my view, the amendment application is a tactical move by Multi-Spex to push the fresh evidence through for purposes of the setting aside application following the failure to do so vide the fresh evidence application. This brings to the fore the question of the bona fides of the amendment application as addressed immediately below;

(b) although Multi-Spex tried to persuade the court that the instant application is bona fide in the light of the events which transpired subsequent to the filing of the OS, including the dismissal of the fresh evidence application, and in order to determine the true facts and events as to its claim in the arbitration proceedings and the real question in controversy between the parties for a proper and complete administration of justice from the pleaded grounds in the OS, I am not

convinced by this argument because Multi-Spex's averments in its affidavits are essentially similar to the affirmations made in support of the fresh evidence application and the same can be said of the proposed amendments when compared with the evidence which Multi-Spex had sought to adduce vide the fresh evidence application. The fresh evidence application was duly considered and dismissed by the court on the grounds as alluded to previously;

(c) ECERDC would be unfairly prejudiced if the amendment application is allowed since the parties have exchanged all their respective affidavits and submissions in respect of the setting aside application and the enforcement application and the hearing of both these Applications will have to be adjourned as the parties will have to exchange affidavits and prepare supplemental written submissions to address the facts in the proposed amendments which was raised belatedly. Multi-Spex's tardiness in the circumstances of this case cannot simply be excused and an order for payment of costs to ECERDC does not make the prejudice caused to ECERDC more palatable (see *Klass Corporation (M) Sdn Bhd v MKRS Management Sdn Bhd* [2016] 4 CLJ 438); and

(d) on the issue of whether the proposed amendments, *if allowed*, would change the character of the suit vide the OS into a suit of another and inconsistent character, I accept Multi-Spex's submission that it does not. Just because the court would have to examine the 23 May 2018 letter in determining whether the award should be set aside or otherwise does not affect the character of the OS which remains as Multi-Spex's application to set aside the award on the grounds as stipulated in the OS pursuant to s 37 of the AA 2005.

[40] Premised primarily on the grounds as elaborated in subparas 39(a) to (c) above, the court was inclined to dismiss the amendment application with costs of RM3,500.

The setting aside application and enforcement application

[41] The extent of intervention by the courts in matters governed by the AA 2005 is clearly laid down in s 8, namely that 'No court shall intervene in matters governed by this Act, except where so provided in this Act.'.

[42] The award in this case is final and binding on the parties (see sub-s 36(1) of the AA 2005) and it can only be challenged on the limited grounds as set out in s 37 of the AA 2005.

[43] In the OS, Multi-Spex has cited subparas 37(1)(a)(v); 37(1)(b)(ii); and 37(2)(b)(i) and (ii); and sub-s 37(3) of the AA 2005 as the basis to set aside the

A entire, or part of the, award. These provisions are re-produced below for ease of reference:

37 Application for setting aside

(1) An award may be set aside by the High Court only if —

B (a) the party making the application provides proof that –

...

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) ... or

C (b) the High Court finds that —

(i) ...

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

D (a) ...

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

E (3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

...

F

[44] Despite the references to sub-paras 37(1)(a)(v); 37(1)(b)(ii); and 37(2)(b)(i) and (ii) in the OS and the AIS, at the stage of written submissions including in the expanded table of the provisions being relied upon by Multi-Spex in the setting aside application, it appears that Multi-Spex has G opted to pursue its challenge against the award based only on subparas 37(1)(b)(ii); and 37(2)(b)(i) and (ii). ECERDC was given the same impression and thus, in its written submissions of Reply, Mr T Kuhendran submitted that Multi-Spex had abandoned its arguments premised on subpara 37(1)(a)(v). At the hearing, I sought clarification from Mr Hafizuddin on this H matter and he was adamant that Multi-Spex was relying on all the grounds as stated in the OS.

[45] Another matter on which the learned counsels were questioned about on the hearing date concerned the filing of Multi-Spex's AIR (encl 31) and I ECERDC's AIR (encl 44). On the date when the fresh evidence application was dismissed, the court had directed, among others, that Multi-Spex's AIR be filed by 4 January 2021. That AIR was eventually affirmed and filed on 5 January 2021 wherein the deponent made statements of fact as to the discovery of the CPO, CPC and SoFA and the enclosures thereto by way of Suit

No 5 and these documents were shown as exhs 'ZH24' and 'ZH25'. The averments in the AIR mirrored those made in Multi-Spex's affidavits for the fresh evidence application and the amendment application. It was instantly recognizable that in spite of the dismissal of the fresh evidence application and the amendment application, Multi-Spex was relentless in wanting to place the evidence regarding these documents before the court for the hearing of the setting aside application to the extent of displaying disrespect to the decisions pronounced on the fresh evidence application and the amendment application.

[46] When questioned by the court regarding the contents of encl 31, Multi-Spex's counsel nonchalantly said that, to his understanding, in dismissing the fresh evidence application, the court took the view that the evidence is not fresh evidence and therefore, the evidence must be 'old evidence' or evidence that has always been there and there is nothing objectionable for Multi-Spex to exhibit 'old evidence' as proof in accordance with para 37(1)(a) AA 2005.

[47] ECERDC did not raise any objections as to the delay of one day in the filing of encl 1 and in fact it proceeded to file its AIR No 2 (encl 44) on 29 January 2021. The court, however, ruled that encl 44 is disregarded as it was filed without leave of the court.

[48] In any event, the court is fully apprised of the previous applications filed by Multi-Spex vide encls 14 and 32 and their outcomes. Although Multi-Spex's conduct in exhibiting the same documents that it sought to introduce as new evidence in encl 14 and failed, is in my opinion a blatant contravention of the order of the court, nevertheless I take cognizance that Multi-Spex has filed a notice of appeal against my decision in dismissing its application in encls 14 and 32.

[49] Hence, for purposes of the setting aside application, I have considered the documents in exhs 'ZH24' and 'ZH25' and the averments regarding the same, lest that I am found to be wrong in the earlier decisions.

The legal principles

[50] Apart from the basic principles of minimal intervention by the courts and that the courts do not exercise appellate jurisdiction over arbitration awards as alluded to in the preceding part of these grounds of judgment, in the course of deliberating the setting aside application, I am guided by the following illuminating judgments in cases of high authority:

(a) with regards to subpara 37(1)(a)(v) AA 2005, in determining whether the arbitrator has decided on matters beyond the scope of the submission to arbitration, the Court of Appeal in *Sigur Ros Sdn Bhd v*

Master Mulia Sdn Bhd [2018] 3 MLJ 608 held that the points of claim, defences and replies in an arbitration are akin to pleadings in a civil suit and as such, the 'pleadings' at the arbitration define the disputes between the parties and the extent of jurisdiction and submission to the jurisdiction of the arbitrator. In para 85 of the judgment, the court said that 'Not only do these pleadings define the dispute(s) that are referred to arbitration, more importantly, the arbitrator takes his mandate and authority from those pleadings insofar as what is required for his determination. The arbitrator cannot exceed those terms of reference or limits of submission which have been demarcated by consensual agreement between the parties. Otherwise, these breaches may become the basis of setting aside of awards under other provisions of s 37(1)(a) of Act 646.' (see too, *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617).

If the arbitral tribunal had improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it, the award may be susceptible to be set aside under subpara 37(1)(a)(v) of the AA 2005 (see *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149).

Subparagraph 37(1)(a)(v) of the AA 2005 is expressed to be subject to sub-s 37(3) of the same Act. This means that those parts of the award which contain decisions on matters which had not been submitted to arbitration may be set aside where those parts are capable of being severed from the other parts of the award which deals with matters falling within the scope of the submission to arbitration.

Erroneous interpretations of the law and of the facts are not grounds on which the courts can set aside an award under subpara 37(1)(a)(v) of the AA 2005 (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597; [2006] SGCA 41);

(b) as for the scope of 'public policy' in subpara 37(1)*(b)*(ii) AA 2005, Multi-Spex and ECERDC have cited the common case authority of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413. In para 47 of the judgment of this court in *SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case* [2020] MLJU 2366, I have summarised the legal principles that can be distilled from *Jan De Nul*'s case as follows:

(i) the concept of public policy generally is itself a broad concept and the term 'public policy' is commonly used to signify some matter which concerns public good and public interest;

(ii) the term 'public policy' in subpara 37(1)(b)(ii) AA 2005 covers a scope of public policy elements as used generally but in subpara 37(2)(b)(ii), the scope is more specific since it categorises a breach of the rules of natural justice which occurred in connection with the

making of an award as being in conflict with the public policy of Malaysia;

(iii) in applying the concept of public policy for the purpose of setting aside an award under s 37 AA 2005, the concept of public policy ought to be read narrowly, more restrictively and taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused;

(iv) the public policy ground for setting aside an arbitral award could be invoked where a violation of the most basic and fundamental notions or principles of morality and justice is proven. It covers fundamental principles of law and justice in both substantive and procedural aspects;

(v) instances such as 'patent injustice', 'manifestly unlawful and unconscionable', 'substantial injustice', 'serious irregularity' and other similar flaws in the arbitral process and award would fall within the applicable concept of public policy but these do not mean injustice which is more than de minimis. What is required is that the injustice had real effect and had prejudiced the basic rights of the applicant and where the upholding of the arbitral award would shock the conscience, be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public;

(vi) the circumstances stated in sub-s 37(2) AA 2005 *are not exhaustive and other appropriate situations may also fall under the category of 'public policy' in view of the opening phrase 'without limiting the generality of sub-para (1)(b)(ii)' as appears in sub-s 37(2); and*

(vii) the court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia before an order can be made to set aside the award.

(c) in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198, the Federal Court provided valuable guideline to the courts when dealing with an application to set aside an award premised on a breach of the rules of natural justice pursuant to para 37(2)(b) of the AA 2005 in this excerpt from the judgment:

> [53] In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:
>
> (a) first, the court must consider: (i) which rule of natural justice was

breached; (ii) how it was breached; and (iii) in what way the breach was connected to the making of the award;

(b) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;

(c) third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;

(d) fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;

(e) fifth, where the breach is significant and might have affected the outcome, the award may be set aside;

(f) sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;

(g) seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact.

[51] I am additionally mindful that Multi-Spex bears the burden of proving its grounds of challenge on a balance of probabilities and that '… In the context of an application grounded on subpara 37(1)(b)(ii) read with subpara 37(2)(b)(ii) AA 2005, even though the court may find that a breach of the rules on natural justice has been established or that an arbitral award is in conflict with the public policy under s 37 AA 2005, it does not necessarily mean that the Award must be set aside as a matter of course. The power of the Court to set aside the Award is discretionary and will not be exercised automatically in every case where the complaints are established (see para 56 in the Federal Court decision of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 at p 429 citing *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644 and *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 3 MLJ 608). These discretionary powers must, of course, be exercised judiciously' (see para 40 in *SJIC Bina*'s case).

First ground: Whether the arbitrator decided on matters beyond the scope of the submission to arbitration (subpara 37(1)(a)(v) of the AA 2005)

[52] In para 23 of the AIS (encl 2), Multi-Spex averred that the arbitrator had exceeded his jurisdiction when he found that Multi-Spex was responsible for defects for 3 APU at Zone A whereas the Notice of Arbitration dated 15 October 2014 and the pleadings only referred to defects at Zone B. Multi-Spex contended that CPC has been issued for Zone A and so any claims for defects should be submitted to PSPK.

[53] Para (3)(A) of the notice of arbitration sets out a brief statement describing the nature and circumstances of the dispute and specifying the relief claimed. In subpara (3)(A), ECERDC said, inter alia, that 'Phase 1 of the BSA project of the APU area has been divided into Zone A and Zone B.' whilst in subpara (3)(D) that 'Shortly after the completion of construction, but just prior to being taken over for use in 2012, a number of buildings in Zone B of the APU area displayed serious defects ...'. Subpara (3)(E) goes on to state that 'Investigations were carried out which confirmed that the serious defects were caused by the Respondent's failure to perform their obligations and to meet the warranties stated in the Letter of Appointment'.

[54] The statements in subparas (3)(A), (D) and (E) of the notice of arbitration are repeated in paras 5 and 11 of the SoC dated 1 November 2015. Subsequently the SoC was amended twice. In the Re-Amended SoC dated 26 February 2018, ECERDC inserted a new para 12 which reads 'A Notice of Arbitration was issued to the Respondent on 15.10.2014. *Sometime in 2015, 3 units of APUs in Zone A and the Central Store displayed serious defects*.' (Emphasis added.)

[55] The reason for the insertion of the said para 12 is explained in ECERDC's AIR (encl 12, see para 12). Basically, after the defects to the three APU in Zone A and the Central Store were discovered, remedial works were carried out and claims were made against Multi-Spex for all the defects to the three APU in Zone A; 22 APU in Zone B; the Store and Work Area No 2 in Zone B; and the Central Store.

[56] However, during the arbitration proceedings, Multi-Spex alleged that Zone A is outside the jurisdiction of the arbitrator as ECERDC's claims were for serious defects discovered in Zone B. Due to this reason, ECERDC amended its SoC to include the said para 12.

[57] ECERDC averred that Multi-Spex had informed the arbitrator that it has no objections to the proposed amendment to the SoC. The amended statement of defence and counterclaim shows that Multi-Spex amended its pleading only once, on 9 September 2016. In other words, Multi-Spex did not, as affirmed by ECERDC, amend its pleading after the insertion of the new para 12 in the Re-Amended SoC.

[58] ECERDC further averred that this issue was not addressed at all in Multi-Spex's written submission at the arbitration. I have perused the written submission and I am unbale to find any submission on the matter which is now raised in the setting aside application.

[59] In Multi-Spex's AIR (encl 31), it did not deny ECERDC's averments in

all the subparas under para 12 of encl 12 with the exception of subparas (a), (b) and (g), which it had no objections to, and instead stated that any claims for defective works should be submitted to PSPK as the CPC has been issued. Hence, ECERDC's statements as to the facts are deemed to have been accepted by Multi-Spex.

[60] Further, it is observed that in para 13 of the re-amended SoC, ECERDC, in alleging that Multi-Spex, its servants or agents were negligent and in breach of contract in the performance of the services under the LoA, pleaded the following particulars:

> a. Failed to properly take into consideration, examine, inspect or analyse the site and/or the nature of the soils or sub-soils at the site, including but not limited to the settlements and subsidence at the site;
>
> b. Failed to properly supervise, examine and inspect the works, including the records of the works, in connection with the piles and its installation and use at the site.

It is plain that ECERDC's complaints pertain to Multi-Spex's obligations which were supposed to carry out at the project site. The defects which were pleaded occurred in Phase 1 of the project which consists of Zone A and Zone B.

[61] Having considered ECERDC's pleadings in the arbitration proceedings, there is no doubt at all that reference has been made to defects in both Zone A and Zone B and that ECERDC's stand is that Multi-Spex is accountable for these defects. Therefore, Multi-Spex's first ground of challenge completely baseless.

Second ground: The arbitrator's findings shows that the defects arose from the performance of the construction of the piles which was not done in accordance with the design and drawings which is PSPK's scope of duty (subparas 37(1(b)(ii), 37(2)(b)(i) and (ii) AA 2005)

Third ground: The arbitrator failed to consider the scope of works of PSPK and KLCCP by preventing Multi-Spex's witness from referring to the construction contract (subparas 37(1)(b)(ii) and 37(2)(b)(i) and (ii) AA 2005)

[62] The second and third grounds of challenge are addressed simultaneously because, after having read the averments in paras 25–33 of the AIS and Multi-Spex's submissions, I find that the issues raised are inter-related.

[63] Multi-Spex relied on paras 3.2, 3.16, 3.18, 4.26 and 5.37(d) in the award in contending that the arbitrator had found that the defects arose from

the performance of the construction of the piles which was not done in accordance with the design and drawings ie which is PSPK's scope of duty and not Multi-Spex's.

[64] However, Multi-Spex did not go on to establish which rule of natural justice was breached, how it was breached, in what way the breach was connected to the making of the award and how the breach prejudiced its rights.

[65] The fact of the matter is that the Tribunal had considered Multi-Spex's contentions that the defective works were caused by PSPK's construction and the key question ie 'under whose supervision was such defective construction allowed to have been carried out?' was asked. The answer to this question was arrived at by reference to the contractual provisions under the consultancy agreement, which is the contract that governed the relationship between the parties. The arbitrator also considered Multi-Spex's argument that the consultancy agreement applied only to the 'pre-construction' period but concluded that it was untenable and baseless.

[66] It would appear that Multi-Spex's real grouse lies in the third ground, namely that the arbitrator had breached the rules of natural justice and s 20 of the AA 2005 by not allowing Multi-Spex to refer to the construction agreement (see para 27(c) in the discussion on the fresh evidence application). This argument has been considered and decided by the court as being completely baseless as Multi-Spex has singled out that particular session of the arbitration hearing on 15 August 2017. This specific instance certainly does not amount to Multi-Spex being prevented from referring to the construction contract.

[67] In ECERDC's written submissions in reply, it had attached the relevant excerpts from the NoP on 28 September 2016 and 18 October 2016 as SCHEDULE 1. Upon scrutinising the NoP, I agree with ECERDC that Multi-Spex was given other opportunities to put its case as to the construction contract during the arbitration hearing. As was said by this court in para 58 of the decision in *SJIC Bina*, '... The critical consideration is that the Tribunal must have accorded procedural fairness to the parties by giving them the opportunity to be heard and latitude in presenting their case before the pronouncement of the Award. Ultimately, the Tribunal must choose between the two diametrically opposed positions taken by the parties. Having made that choice, IRDA is evidently dissatisfied and has attempted to attack what is essentially the merits of the Award in the guise of a purported breach of the rules of natural justice'.

[68] As for the contention that the Tribunal failed to consider the scope of works of KLCCP, nothing could be further than the truth. The arbitrator did not fail in his duty in this regard as exemplified by the following passage in the

award:

> 4.13 The Respondent's argument, as to why it was not responsible for supervising construction works, and/or for poor services performed by the Supporting Consultants, is essentially this (see paras 89 to 100 of RWS):
>
> (a) The Consultancy Agreement applies only to a so-called 'pre-construction' period (implying mainly the 'design-stage'). The Respondent's duty of supervision did not involve supervision of construction works.
>
> (b) Supervision of works performed in a so-called 'post-construction' period was governed only by the Building Contract, under which KLCCP had the 'main' duty (para 192 of RWS) to supervise works, or KLCCP was 'partly liable to supervise' works (para 80 of RWS).
>
> 4.14 In my view, the Respondent's above argument is nothing more than wishful and disingenuous. It is wishful, because there is neither factual nor legal basis for the Respondent's assertions. It is disingenuous, because the Respondent seems o be aware of its unsustainability; since it contradicts its own argument, in other parts of the RWS.

Multi-Spex was given ample opportunity to present its case including to submit, among others, that KLCCP is responsible for the duty of supervision of the works, and not Multi-Spex.

[69] Even assuming for a moment that there was a breach of the rules of natural justice as argued by Multi-Spex, it still bears the onus to establish that the breach has a real impact on the result such that the Tribunal would have reached a different conclusion. If the breach is relatively immaterial or was not likely to have affected the outcome, the discretion of the court to set aside the award will be refused (see the decision of the Federal Court in *Master Mulia*). In the instant case, the arbitrator would have still analysed the provisions of the consultancy agreement and come to the conclusion as he did, that Multi-Spex was responsible to supervise the works.

[70] In the premises, I find and hold that there is no merit whatsoever to these two grounds of challenge.

Fourth ground: Whether the arbitrator had ignored Multi-Spex's written submission regarding the issuance of the CPC to PSPK and the final account in negative of approximately RM13m (subparas 37(1)(b)(ii) and 37(2)(b)(i) and (ii) of the AA 2005)

[71] Multi-Spex's grievance is that the arbitrator disregarded para 167 in its written submission at the arbitration as quoted in para 27(c)above and thereby failed to consider PSPK's role in the project.

[72] However, as pointed out by ECERDC, this fourth ground was not pleaded in the OS and no averments are made in the affidavits. In any event, Multi-Spex had put its case across at the arbitration by way of the said para 167 which consists of merely a single sentence without any expanded argument.

[73] An arbitral tribunal has the duty to deal with all essential issues in the arbitration and should be given a fair amount of latitude in determining what constitutes essential issues as opposed to subsidiary or peripheral issues. An issue may not be specifically addressed in the award but might be implicitly resolved (see *BLB v BLC* [2013] 4 SLR 1169).

[74] If the point of argument which Multi-Spex wished to convey to the Tribunal is as significant as it has been made out to be in the setting aside application, Multi-Spex's counsel should have given more attention and put more effort in developing the submission. As it stands, the said para 167 is a bare statement and the fact that the arbitrator makes no mention of it in the award shows that in all likelihood, he treated it as a peripheral matter which did not affect the final decision or it was implicitly resolved.

[75] It must be remembered that it is not the function of the court to comb the award microscopically in search of any fault in the arbitral process. The award should be read generously such that only meaningful breaches of the rules of natural justice are remedied (see *Kerajaan Malaysia v Syarikat Ismail Ibrahim Sdn Bhd & Ors* [2020] MLJU 52; [2020] 1 LNS 40).

[76] In my considered view, Multi-Spex has not shown sufficient evidence to persuade this court that there is a breach of natural justice during the arbitral proceedings or in connection with the making of the award premised on the fourth ground.

Fifth ground: The establishment of the arbitrator's findings and Multi-Spex's submission regarding the deduction of the sum of RM13,178,815.40 for rectification works by third parties for major defects in Zone B and the Central Store would have a real and substantial impact on the outcome of the award

Sixth ground: Whether the quantum of the award is excessive and would unjustly enrich ECERDC which is a violation of the basic notions of morality and justice (subparas 37(1)(b)(ii) and 37(2)(b)(i) and (ii) AA 2005)

[77] Both these grounds are taken together as they revolve around the same submissions made in the fresh evidence application and amendment application in respect of the 23 May 2018 letter, the CPC and the SoFA and the costs of remedial works by third parties for which a deduction of RM13,178,815.40 was reflected in the SoFA.

[78] Firstly, the fifth ground is assailable for the same reason as the fourth ground in that it was not pleaded in the OS and not deposed by Multi-Spex in the affidavits.

[79] Secondly, based on the affidavit evidence in the setting aside application, I am satisfied that Multi-Spex was given ample opportunity to argue on the issues of 'Delay, mitigation & betterment' (see Multi-Spex's written submission at the arbitration and paras 5.28–5.37 of the award) and 'Quantum of the Claimant's loss' (see Multi-Spex's written submission at the arbitration and paras 5.38–5.48 of the award). However, the arbitrator found, as regards the former, that Multi-Spex failed to adduce the necessary evidence to prove its case and to rebut ECERDC's case, and as regards the latter, that ECERDC has proven the quantum claimed is genuine and reasonable based on documentary evidence produced at the arbitration whereas Multi-Spex has failed to prove the quantum, on a balance of probabilities, for its counterclaim.

[80] Thirdly, and at the risk of repetition, in pronouncing the decision on the amendment application, the court found, inter alia, that the SoFA is of no relevance to the subject matter of the arbitration and would not have absolved Multi-Spex of its obligations under the consultancy agreement. Multi-Spex has not shown how the alleged breaches of the rules of natural justice would have a real impact on the award such that the Tribunal would have reached a different conclusion on the issues of the party who is responsible for supervising the construction works at the material time and on quantum of the award. Moreover, PSPK had disputed the SoFA and thus, Multi-Spex's contention that ECER is unjustly enriching itself by double claims is unsubstantiated.

[81] Finally, for the sake of completeness, it must be mentioned that based on paras 34–39 of the AIS, the gist of Multi-Spex's averments on its dissatisfaction with the quantum of the award was summarised in ECERDC's written submissions as follows:

(a) The quantum of payment to MEC Jati has no basis, is excessive and unfair as it relates to both Zone A and B, where the Plaintiff has completed its scope of works in Zone A and the Defendant's dispute is only in relation to Zone B. As such, the quantum should be divided between PSPK and the Defendant.

(b) The quantum of payment to RPM as payment to the principal consultant replacing the Plaintiff has no basis, is excessive and unfair as the principal consultant's fee would have had to be paid even if the Plaintiff was still the Principal Consultant and having not paid the Plaintiff's fee (as per its Counter Claim) there isn't any payment claimable from the Plaintiff.

(c) The quantum of payment to KPK has no basis, is excessive and unfair where the cost ought to be borne by the Defendant.

(d) The costs awarded to the Defendant has no basis, is excessive and unfair.

[82] The averment as in subpara 81(a) above has already been addressed in part (see paras 52–61 above) and taken with the other averments, are devoid of merit because Multi-Spex's complaints are in essence, yet again, against the outcome of the award which it contends ought to have been decided in its favor.

[83] On the issue of the award of costs of RM800,000 to be payable forthwith by Multi-Spex to ECERDC, in para 17 of its AIR (encl 12), ECERDC stated that Multi-Spex '... failed to put in their submissions in respect of cost despite numerous reminders by the Arbitrator, and should therefore be estopped from contending that the cost of RM8000,000.00 awarded by the Arbitrator is without any basis, exorbitant and caused injustice to the Plaintiff'. In its reply (para 26, encl 31), Multi-Spex did not deny the averments by ECERDC.

[84] ECERDC had duly complied with the arbitrator's direction by submitting the Bill of Costs dated 13 March 2020 (see AIR, encl 13 at pp 986 -993) but Multi-Spex, at its own peril, did not. Having been given the opportunity to address the Tribunal on the issue of costs and in allowing that occasion slip by, it surely does not lie in the mouth of Multi-Spex to assert that there has been a beach of natural justice in this regard.

CONCLUSION

[85] Following from the above analysis, it is obvious that Multi-Spex has not established the legal requirements as laid down by the appellate courts in its attempt to set aside the award pursuant to the provisions as cited in the OS.

[86] In these circumstances, it is a foregone conclusion that the setting aside application must be dismissed and that the enforcement application be allowed. This was so ordered with costs in the sum of of RM10,000 to be paid by Multi-Spex to ECER for each OS, subject to allocatur.

Enforcement application allowed; and fresh evidence application, amendment application and setting aside application dismissed.

Reported by Nabilah Syahida Abdullah Salleh